



THE ATTORNEY GENERAL OF TEXAS

**JOHN L. HILL
ATTORNEY GENERAL**

AUSTIN, TEXAS 78711

October 3, 1973

The Honorable Jess M. Irwin, Jr.
Commissioner for Rehabilitation
Texas Rehabilitation Commission
1600 W. 38th Street
Austin, Texas 78731

Letter Advisory No. 62

Re: Dual Employment -
employee of the Texas
Rehabilitation Commis-
sion as member of Board
of Trustees of an Indepen-
dent School District

Dear Mr. Irwin:

You have asked us to determine whether you, in your position as Commissioner for Rehabilitation, have legal authority to determine whether incompatibility exists between the office of School District Trustee and the position of Rehabilitation Counselor under your Commission.

If our answer to the first question is that you do have such authority, you also ask whether you have the legal basis for requesting resignation of the Commission employee from the Board of Trustees of the school district or, if the first question is answered in the negative, what action the Commission should take to have the question of incompatibility resolved.

As you describe the position of Rehabilitation Counselor, you state that he is expected to utilize community resources to the extent available in the furtherance of the rehabilitation of clients of the Commission and to seek placement for clients in gainful occupations. You state that, for the work of the Texas Rehabilitation Commission to be effective, it is necessary that you establish good working relationships with private and governmental agencies in related fields of health and human resources and that the Commission must have the support and good will of the business community to provide maximum placement opportunities for its clients.

You point out as a fact that the independent school district involved is embroiled in a political controversy which has divided the community, raising in your mind the question of whether this particular employee's position as a Trustee of that district is in the best interests of the Commission.

Your letter also points out that there is a contract existing between the Commission, on one hand, and the particular independent school district on the other for a cooperative program to aid disabled youth.

Finally, you indicate that perhaps the Commission employee, in his effort to give time to the office of Trustee, may fail to meet his responsibility to the Commission.

It is the rule in Texas, established by the common law and not by any statute or constitutional provision, that one person may not accept and qualify for two legally incompatible offices. Thomas v. Abernathy County Line Independent School District, 290 S. W. 152 (Tex. Comm. App., 1927); Attorney General Opinion H-7 (1973) and see the discussion at 47 Tex. Jur. 2d, Public Officers, § 28, p. 42 et seq. Offices are legally incompatible when the faithful and independent exercise of one would necessarily interfere with or control the faithful and independent exercise of the other. See Letter Advisory No. 54 (1973).

There have been very few appellate decisions determining what offices are incompatible. The Thomas case involved the offices of Trustee of Independent School District and Alderman of a city within the district. There have, however, been a number of decisions by the office of the Attorney General. None, apparently pertains to the precise situation you present.

It is our opinion that, in most instances, whether or not two positions are legally incompatible is a fact question to be determined initially by those having supervision in one or both of the positions held by the person in question and, ultimately, by the courts. We are not able to resolve disputes of fact. Where you, as the Executive head of one of the employing agencies have concluded that facts exist which make the two positions legally incompatible, it is our opinion that you are entitled to treat them as incompatible unless and until a court says you are in error.

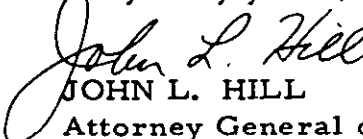
We call to your attention that where an employee occupies two offices which he may not occupy for constitutional reasons or at common law, it is the common law rule that by accepting the second of such positions, the person automatically vacates the first. Pruitt v. Glen Rose Independent School District, No. 1, 84 S. W. 2d 1004 (Tex. 1935).

With reference to that part of your letter in which you question whether one employee may, at the same time, give sufficient time and effort to the office of member of the Board of Trustees of an independent school district and to the employment by the Commission as a Rehabilitation Counselor, we believe that this is a matter involving the terms of the individual's employment with the Commission. Strictly speaking, such facts do not alone create any legal incompatibility, but rather an impractical situation that would exist even if the time-demanding second occupation were a private employment rather than a public position.

Even if the positions are not incompatible, nevertheless, any employer, including the State or one of its agencies, has the right to insist that an employee devote as much time to his employment as was contemplated at the time he was employed. If he does not do so, such appropriate action may be taken as would be taken against any other employee who did not devote the expected amount of energy to his employment.

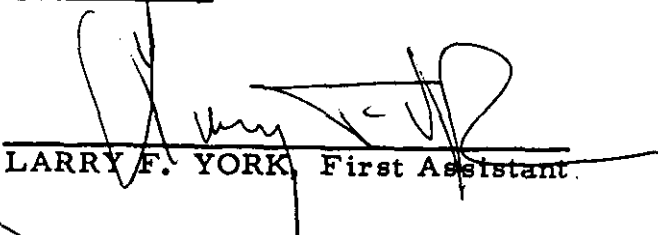
In answer to your questions we would advise you therefore that the Texas Rehabilitation Commission, and its Executive Officer, have the authority to make the initial determination as to legal or practical incompatibility between the two offices you describe. If legal incompatibility does exist, the effect is that an employee accepting a second office automatically vacates his first one. Certainly, if a practical incompatibility exists, there would be legal basis for you as Commissioner, to request the resignation by the employee from the Board of Trustees of the independent school district as a condition to remaining in the employ of the Commission.

Very truly yours,


JOHN L. HILL

Attorney General of Texas

APPROVED:



LARRY F. YORK, First Assistant



DAVID M. KENDALL, Chairman
Opinion Committee